(1)

Supreme Court, U.S.
FILED

95-357 AUG 31 1995

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

PAMELA HOUSTON, *Petitioner,*

V.

ALL SAINTS HEALTH SYSTEM, INC.,
JENNY McNEIL, AND DR. KENNETH PEARCE,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Henry C. Meyer
4109 Penrose Avenue
Ft. Worth, Texas 76116
817/732-4258
Attorney for Petitioner
Counsel of Record

60 pp

QUESTIONS PRESENTED

QUESTION NO. ONE

Whether a hospital is liable for the conduct of a staff physician who practices racial and sexual discrimination in the hospital workplace and whether staff physicians are agents of the hospital under Title VII of the Civil Rights Act of 1964.

QUESTION NO. TWO

Whether in a discriminatory abusive environment case the reprimand of a staff physician by a hospital nurse supervisor constitutes prompt remedial action under Title VII.

QUESTION NO. THREE

Whether immediate supervisors and agents of the employer are individually liable for racial discrimination and sexual harassment under title VII of the Civil Rights Act of 1964.

QUESTION NO. FOUR

Whether summary judgment is a proper procedure for deciding the nebulous questions of motivation and intent in Title VII cases, and in particular the question of whether an employers articulated reason for discrimination is legitimate or pretext, and does such procedure deprive the employee of right to trial by jury.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 7

A. Sexual and Racial Harassment 7

B. Discrimination 9

C. Proceedings Below 10

REASONS FOR GRANTING THE PETITION 12

I. The decisions below are in conflict with the decisions of the Supreme Court in *Meritor Savings Bank v. Vinson* and *Harris v. Forklift Systems, Inc.* 13

II. The decisions below are in conflict with the decisions of the Supreme Court in *Anderson v. Liberty Lobby, Inc.*, *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, (1970), and *McDonnell Douglas Corp. v. Green* 16

III. The court of appeals erroneously held that a mere verbal reprimand constitutes prompt remedial action. 20

IV. There is a conflict among the circuits as to whether agents and supervisory employees are liable for violating Title VII. 21

V. The Question Presented is important. 22

CONCLUSION 23

APPENDIX A

Opinion of court of appeals 1a
Order denying rehearing 15a

APPENDIX B

District court's Memorandum Opinion and Order 16a
District court's final judgment 25a
District court's order of dismissal 26a

APPENDIX C

Determination of the City of Fort Worth Human Relations Commission 28a

APPENDIX D

EEOC Notice of Right to Sue 31a

TABLE OF AUTHORITIES

Cases

Page

Adickes v. S.H. Kress and Co., 398 U.S. 144 (1970) 12, 17, 18
Anderson v. Liberty Inc., 477 U.S. 242, 106 S. Ct. 2505, 9 L.Ed.2d 202 ..... 12, 17, 18, 22

Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) 20, 21

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 ..... 16, 17

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 19

Hamilton v. Rodgers, 791 F.2d 439 (5th Cir., 1986) 21
Harris v. Forklift Systems Inc., 510 U.S. __, 126 L.Ed.2d 295, 114 S. Ct. 367 ..... 12, 15

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S. Ct. 1817 ..... 12, 17,18
Meritor Savings Bank v. Vinson, 477 U.S. 57, 91 L.Ed.2d 49, 106 S. Ct. 2399 ..... 12, 13, 14, 20, 21
Miller v. Maxwell's Intern, Inc., 991 F.2d 583 (9th Cir. 1993) 21

Rogers v. EEOC, 454 F.2d 234 (5th Cir. , 1971), Cert. Denied, 406 U.S. 957, 32 L.Ed.2d 343, 92 S. Ct..2058 21

TABLE OF AUTHORITIES—Continued

Page

Statutory Provisions, Regulations, and Rules
28 U.S.C. §1254(1) 1
28 U.S.C. §1331 10
42 U.S.C. §2000e 2
42 U.S.C. §2000e (b) 21
42 U.S.C. §2000e-2 ..... 2, 3
42 U.S.C. §2000e-3 3
29 C.F.R. §1604.11 ..... 3, 4, 5
29 C.F.R. §1604.11(b) 4, 21
29 C.F.R. §1604.11(e) 4, 5, 14

Federal Rules of Civil Procedure
Rule 56 ..... 5, 6, 10, 16, 17, 18, 19, 22

United States Constitution
Seventh Amendment 6, 17, 19

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

PAMELA HOUSTON, *Petitioner*,
v.
ALL SAINTS HEALTH SYSTEM INC., JENNY McNEIL and DR. KENNETH PEARCE, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Pamela Houston respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1a) is unreported.

The order, memorandum opinion and judgment of the district court (App., infra, 16a) is unreported.

The determination of the city of Fort Worth Human Relations Commission (App., infra, 28a) is unreported.

The EEOC Notice of Right to Sue (App., infra, 31a) is unreported.

JURISDICTION

The court of appeals entered its judgment denying petitioner's motion for rehearing on June 12, 1995. (App., infra, 15a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e. Definitions

For the purposes of this subchapter-

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in § 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under § 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents,) shall not be considered employers.

42 U.S.C. § 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3. Other unlawful employment practices

Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

29 C.F.R. § 1604.11 Sexual harassment

(a) Harassment on the basis of sex is a violation of § 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment

decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as an "employer"), is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the

Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

Rule 56 of the Federal Rules of Civil Procedure

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall

be made on personal knowledge, shall set forth such facts as would be admissible in evidence, shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

United States Constitution,
Amendment Seven

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

STATEMENT

Petitioner, a black female nurse sued her employer, All Saints Hospital, the hospital's surgery supervisor, Jenny McNeil and the hospital's chief of anesthesiology, Dr. Kenneth Pearce, for racial and sexual harassment and discrimination. The district court dismissed as to Respondent McNeil on the ground that supervisors are not liable under Title VII, and granted motions for summary judgment as to the hospital and Dr. Pearce. The Fifth Circuit affirmed.

A. Sexual and Racial Harassment

Pamela Houston, a black female registered nurse, was employed by All Saints Hospital in its surgery department. The hospital contracted its anesthesiology services to a corporation run by Dr. Kenneth Pearce, a Caucasian physician. Dr. Pearce was on the hospital staff and held the position and title of "Chief of Anesthesiology". He employed more than fifteen nurse anesthetists to assist him at the hospital, and he ran the surgery schedule. Houston was instructed that she was to follow Dr. Pearce's orders. She had also been told that he could have her fired.

Upon being introduced to Dr. Pearce by her supervisor in 1984, he said to Ms. Houston; "Gee you're pretty, have you ever made love to a white man?" Thereafter, and throughout her employment, Plaintiff was subjected to repeated racial and sexual jokes, epithets and slurs by Dr. Pearce in her workplace such as: "I looked for you a good white nurse, but the best I could do was this black one." He would shuffle down the hallway and say, "Is'a commin' master". He would ask black employees: "What are y'all doing working today? You should be home eating barbecue, watermelon and drinking red soda water..." "Why aren't you out marching for John Wylie Price?" He said to Ms. Houston: "Pam, if you were a slave, I would buy you"; "You know how your black men are, they all like p-u-s-s-y"; and "Gee, you have pretty titties". Dr. Pearce would hug Ms. Houston in the hallway and say: "can you feel it? It is down to your knees". Petitioner testified in detail by affidavit and deposition that Dr. Pearce's conduct interfered with her work and created an offensive and hostile work environment. Petitioner also testified that McNeil and nurse director Geraldine Petersen were aware of and had knowledge of Dr. Pearce's habit of making sexual and racial jokes and epithets at the hospital. In her deposition McNeil admitted that Dr. Pearce did make racial and sexual jokes in

the workplace and that she had heard him make sexual comments to nurse director Petersen. Petitioner testified that she was humiliated and hurt by Dr. Pearce's conduct but that she was afraid to say anything to her supervisors.

In July 1991, Petitioner reported to supervisor McNeil that two female patients had complained to her about Dr. Pearce's conduct and that she was tired of it. McNeil, with the concurrence of nurse director Petersen then met with Dr. Pearce and "counseled" him against making racist comments to Petitioner. The hospital took no other action against Dr. Pearce, and took no further steps to eliminate discrimination in the surgery department. Following the meeting with McNeil, Dr. Pearce ceased making racist comments directly to Petitioner, but continued to engage in sexual and racial jokes and comments in the workplace.

On October 15, 1991, Plaintiff filed her EEOC charge complaining of All Saints Hospital, Jenny McNeil, and Dr. Kenneth Pearce. All Saints, notified the Fort Worth Human Relations Commission that it would not consider a negotiated settlement because Dr. Pearce was "not an employee of All Saints Hospital." On June 3, 1993, the Fort Worth Human Relations Commission issued its determination letter finding that All Saints, McNeil and Dr. Pearce had discriminated against Pamela Houston and invited the parties to join with the Commission to eliminate unlawful employment practices. (App., infra, 30a).

The following week, on June 11, 1993, the hospital gave Petitioner formal notice that her employment had been terminated.

B. Discrimination

Petitioner worked in the surgery "holding room" on the 7:00 a.m. to 3:00 p.m. shift. Most surgeries were performed during this shift. Her job was to complete charts and prepare patients for surgery. The hospital orderlies were

to transport these patients to the operating rooms, which were some distance from the holding room. The orderlies at All Saints Hospital are predominately white males. In May 1991, McNeil changed Petitioner's job duties by ordering her to transport all surgery patients from the holding room into the operating rooms without assistance from the orderlies or other nurses.

Petitioner testified that "no other male, female, Caucasian, any other race or nationality was pulled out of their job description, (7:30) cases, to push stretchers other than myself". The hospital's explanation for this disparate treatment was that it would speed delivery of the patients into surgery. Petitioner's testimony and other evidence indicated that it would not.

Ms. Houston was the only nurse assigned to the holding room. She could not prepare patients for surgery, complete their charts, and push all occupied stretchers, unassisted, into the surgery suites, and effectively speed up delivery. Petitioner protested being removed from her nursing duties to transport patients and asked for an explanation. McNeil's only reply was, "Because I want you to do it."

Petitioner pushed patient stretchers daily as ordered by her supervisor McNeil. She suffered a back strain on May 31, 1991, and was given a doctor's recommendation to continue her duties but to have assistance with transporting stretchers if needed. However, McNeil did not assign anyone to a assist her. On August 21, 1991, she re-injured her back while pushing stretchers and was unable to return to work.

Petitioner filed a workers' compensation claim and in March of 1993, the Texas Workers' Compensation Commission Appeals Panel entered a decision supporting Petitioner's injury. As stated, in June 1993, All Saints terminated Petitioner's employment.

C. Proceedings Below

Petitioner filed suit in the district court of Tarrant County, Texas alleging discrimination, abusive work environment, constructive discharge, and that she was terminated because of her workers' compensation claim and her EEOC charges. Petitioner sought damages, and equitable relief.

The state court suit was removed to the federal district court pursuant to 28 U.S.C. § 1331.

The parties completed discovery on September 12, 1994. Petitioner demanded a jury and trial was set for November 7, 1994. On August 31, 1994, the Respondents filed motions for summary judgment. As relevant here they alleged: "C. As Dr. Pearce was not an agent, representative or employee of All Saints, All Saints cannot be held responsible for his actions;" "D. Defendants are entitled to summary judgment as to Plaintiff's race harassment claims as Defendants took prompt remedial action to protect the Plaintiff;" "E. Defendants are entitled to summary judgment as to Plaintiff's claim that she was discriminated against by being forced to push occupied stretchers as Defendants had a nonpretextual, legitimate business reason for requiring such;." In compliance with Rule 56(e), F.R.C.P. Petitioner on September 22, 1994, filed her response to the motions for summary judgment supported by her affidavit and excerpts from her deposition and the deposition of McNeil. Petitioner set forth specific and detailed facts about Dr. Pearce's authority and conduct in the workplace. Petitioner testified unequivocally that Dr. Pearce continued to make sexual and racial comments in the workplace after the "reprimand". Petitioner testified in detail about her job duties and the disparate treatment by McNeil in ordering her to push stretchers for the orderlies, and that requiring her to transport the patients would not speed up delivery of patients into the

operating rooms. Documentary evidence supported Petitioner's testimony that it was the orderlies' job to transport patients and that Petitioner's performance evaluations required her to spend more time in the holding room completing charts. Petitioner detailed Dr. Pearce's racial and sexual conduct from 1984 to August 21, 1991, and identified witnesses she intended to call as to Dr. Pearce's conduct both before and after Petitioner left the hospital in August of 1991.

On October 7, 1994, the district court, without fixing a date for a hearing, and without hearing argument from counsel, granted summary judgment holding that the "reprimand" of Dr. Pearce by nurse McNeil constituted prompt remedial action, and that Dr. Pearce was not liable since he was not Petitioners' employer. (App., infra, 23a). With respect to the hospital's liability the court said that if required it would find that the hospital was not responsible for his conduct since "Pearce was not an employee of All Saints". (App., infra, 22a). The court of appeals held that the reprimand by nurse McNeil was prompt remedial action and said it was immaterial that McNeil had no authority over Dr. Pearce. Regarding Dr. Pearce, the court said: "As a Title VII suit may not be maintained against an individual, Dr. Pearce may only be held liable if he, in his employment capacity at All Saints, is deemed to be Houston's "employer" for Title VII purposes." (App., infra, 6a). The court concluded that Dr. Pearce was not Petitioners' employer, and that he was not an "agent" of the hospital because he had not been delegated the authority to make employment decisions.

As to Petitioners claim that McNeil and the hospital violated Title VII by requiring her to push patient stretchers for the orderlies, the court of appeals held that defendant had articulated a "legitimate, nondiscriminatory reason" for the discrimination; and that Petitioner failed to raise a genuine issue as to whether defendants' proffered reason merely served as a pretext for discrimination. (App., infra, 9a).

The court of appeals held that the burden had shifted to Petitioner to show that summary judgment should not be granted, and entered judgment affirming the district court. (App., infra, 4a, 14a).

REASONS FOR GRANTING THE PETITION

The decisions below conflict with Title VII and the EEOC Guidelines designed to eliminate discrimination in the workplace and with decisions of the Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 91 L. Ed 2d 49, 106 S. Ct. 2399. *Harris v. Forklift Systems, Inc.*, 510 U.S. ___, 126 L. Ed. 2d 295, 114 S. Ct. 367, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 9 L. Ed. 2d 202, and *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, (1970).

The courts below disregarded the EEOC Guidelines and contrary to the decision in *Meritor Savings Bank v. Vinson*, declined to apply agency principles in determining whether the hospital was liable for the conduct of Dr. Pearce. The court of appeals erroneously held that Dr. Pearce was not an "agent" of the hospital and was not liable for racial and sexual discrimination.

Contrary to the holding in *Anderson v. Liberty Lobby, Inc.*, the courts below erroneously held that to defeat the motions for summary judgment Petitioner had the burden to prove that the employers explanation was not a pretext. Also, there is uncertainty as to whether the burden of proof rule announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed 2d 668, 93 S. Ct. 1817, should be applied in summary judgment proceedings. There is a conflict among the circuits as to the questions raised herein which have not been, but should be settled by this Court.

This case is a timely and rare opportunity to provide much needed guidance, and the issues involved are

important. Moreover, the decisions below are erroneous and such a departure from the accepted and usual course of judicial proceedings to call for an exercise of this Courts power of supervision.

I. The decisions below are in conflict with the decisions of the Supreme Court in *Meritor Savings Bank v. Vinson* and *Harris v. Forklift Systems, Inc.*.

In *Meritor Savings Bank v. Vinson*, Michelle Vinson sued her employer, Meritor Savings Bank and its vice president, Sidney Taylor claiming that she had been sexually harassed by Taylor in violation of Title VII. The district court held that the bank could not be held liable since it had no knowledge of Taylor's conduct. The court of appeals reversed and held that an employer is strictly liable for a hostile environment created by a supervisor's sexual advances even though the employer neither knew nor could reasonably have known of the misconduct. The court of appeals held that a supervisor is an "agent" of his employer for Title VII purposes, even if he lacks authority to hire, fire or promote.

The Supreme Court decided that agency principles must be considered in determining whether an employer is liable for sexual harassment by a supervisor or agent, but declined to write a definitive rule on employer liability. Justices Marshall, Brennan, Blackmon and Stevens concurring believed that the court should have applied the EEOC Guidelines to hold employers strictly liable for the acts of its agents and supervisors leading to a discriminatory work environment regardless of whether the employer had "notice" of the offense.

In the case at bar, the courts below failed to apply agency principles and held that the hospital could not be responsible for the conduct of Dr. Pearce since he was not an

employee of the hospital. Since Dr. Pearce was a non-employee both lower courts treated the case as requiring Petitioner to give notice of Dr. Pearce's misconduct before the hospital would have a duty to take remedial action. The district court concluded: "In determining whether All Saints is indeed liable for Pearce's conduct, assuming plaintiff's allegations are true, the court need not reach the point of examining the legal relationship between them". (App., infra, 22a). Thus, the district court disregarded agency principles and declined to consider the legal relationship between All Saints and Dr. Pearce. The court of appeals held that Dr. Pearce could not be liable because he was not Petitioner's employer and he was not an "agent" of the hospital since All Saints did not delegate any employment decisions to Dr. Pearce." (App., infra, 7a, 8a).

These decisions of the courts below are in direct conflict with the EEOC Guidelines which specifically declare that an employer may be liable for the sexual or racial misconduct of non-employees. See 29 C.F.R. § 1604.11(e) reading as follows: "An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees."

As previously stated, the Supreme Court in *Meritor Savings Bank v. Vinson* decided that the courts should be guided by agency principles in this area, and that the question is not whether the supervisor or agent has been delegated employment decisions such as the right to hire, fire and promote, but whether they have authority or the

appearance of authority in the workplace. Accordingly, the Court held that an examination is required of the circumstances of the relationship and job functions performed by an individual in determining whether he or she acts in a supervisory or agency capacity. (477 U.S. at p. 71). Justice Marshall in his concurring opinion explained: "In both cases it is the authority vested in their supervisor by the employer that enables him to commit the wrong; It is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates". (477 U.S. at p. 77).

The hospital placed Dr. Pearce in a position of authority which enabled him to engage in racial and sexual misconduct in the workplace and the hospital should be responsible for his unlawful harassment.

In *Harris v. Forklift Systems, Inc. Supra,* the petitioner, Harris sued her former employer claiming that the conduct of Forklift's president constituted an abusive work environment due to sexual jokes and innuendo. The Supreme Court held that in an abusive environment case, the employee is not required to prove that she was harmed psychologically; that Title VII is violated if the environment would be reasonably perceived and is perceived as hostile or abusive; and that whether an environment is hostile or abusive can be determined only by looking at all the circumstances. (126 L.Ed.2d 295, 302). In the case at bar, Petitioner's summary judgment proof showed that Dr. Pearce had authority over Petitioner in her workplace and she perceived his sexual and racial conduct to be offensive.

The district court and the court of appeals did not look at all the circumstances but only the one incident about which Petitioner complained to McNeil. The courts ignored the other circumstances and many other instances of racial and sexual conduct by Dr. Pearce during the years of Petitioner's employment at All Saints Hospital.

II. The decisions below are in conflict with the decisions of the Supreme Court in *Anderson v. Liberty Lobby, Inc.*, *Adickes v. S.H. Kress and Co.*, and *McDonnell Douglas Corp. v. Green*

In response to the hospital's motion for summary judgment, Petitioner filed a detailed response calling to the attention of the court specific facts in the deposition and affidavit of Petitioner, the deposition of Jenny McNeil, the deposition of John Milburn, the hospital's personnel director, the contract between the hospital and Dr. Pearce, and evidence showing that Dr. Pearce gave orders to hospital nurses and supervisors. Petitioner's summary judgment evidence showed that Dr. Pearce exercised authority in the workplace and that he had engaged in a pattern of sexual and racial conduct since as early as 1984, in the presence of supervisors and nurses. Petitioner called to the attention of the court in her discovery response the names of nurses, supervisors, and physicians she intended to call as witnesses to Dr. Pearce's behavior. Petitioner, in opposition to the motions for summary judgment, did not rest merely on the allegations in her pleadings. She came forward with evidence showing that Dr. Pearce was an agent of the hospital, and that he had for years engaged in racial and sexual conduct in the workplace, creating an abusive work environment.

The court of appeals, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986), misapplied Rule 56(e), F.R.C.P. and held that Petitioner, the non-movant, had the burden to prove that there were genuine issues of material fact. The court said: "Once a movant makes a properly supported motion for summary judgment, the burden shifts to the non-movant to show that summary judgment should not be granted because a genuine issue for trial exists." (App., infra, 4a). The court in *Celotex Corp. v.*

Catrett, however, did not shift the burden. Rather, the court held that the burden on the moving party may be discharged by showing that there is an absence of evidence to support the nonmoving party's case. The court was careful to point out that the last two sentences of Rule 56(e) were added to disapprove allowing the opposing party to resist summary judgment by reference only to its pleadings. (*Celotex*, 477 U.S. at 324, 325).

In *Anderson v. Liberty Lobby, Inc. Supra*, the court made it clear that at the summary judgment stage the trial judge's function is not himself to weigh the evidence, make credibility determinations, or draw legitimate inferences from the facts, since these are jury functions. (*Anderson*, 477 U.S. at 242).

In *Adickes v. H.S. Kress and Co.*, 398 U.S. 144 (1970) the Court held that the inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion and that the 1963 amendment to Rule 56(e) was not intended to modify the burden of the moving party.

Also, the court of appeals erroneously applied the burden of proof rule of *McDonnel Douglas Corp. v. Green*, 411 U.S. 792, 935, Ct. 1817, 36 L.Ed.2d 668, to a summary judgment proceeding depriving Petitioner of her right to demonstrate to a jury that the hospital's reason for disparate treatment is a pretext. The court of appeals said that Petitioner had the burden to prove that the hospital's proffered reason for disparate treatment was not true and that it merely served as a pretext for unlawful discrimination. (App., infra, 9a). The court held that in order to defeat the motion for summary judgment, Petitioner had to produce evidence at the summary judgment stage showing that McNeil harbored a discriminatory motive even though the evidence shows that the discrimination was patently obvious in purpose and effect. Such holding conflicts with all principles of jurisprudence, the Seventh Amendment, this

courts decisions in *Adickes* and *Anderson v. Liberty Lobby Inc.*, and the principle announced in *McDonnell Douglas Corp. Green*, that the employee must be afforded a fair opportunity to demonstrate the employers' assigned reason was a pretext or discriminatory in its application. (*McDonnell Douglas Corp. v. Green* 411 U.S. at 807).

Employment discrimination cases involve subjective questions of motivation and intent which can only be proven by circumstantial evidence. It is arguable that summary judgment is a questionable procedure in such cases. In any event, it is clear that Rule 56(e) F.R.C.P. does not give to trial judges the power to be the fact-finder where one of the parties demands a jury trial. In *Anderson v. Liberty Lobby Inc.*, the Supreme Court warned that trial judges should not use Rule 56(e) to denigrate the role of the jury, and made it clear that its opinion should not be construed as authorizing trial on affidavits. The Court said: "It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes*, 398 U.S., at 158-159. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." (477 U.S. at p. 242).

The lower courts accepted as true McNeil's controverted and self-serving statement that Houston, as holding room nurse, was the logical person to push patients from the holding room to the operating rooms, and said that there was no reason to question McNeil's explanation. (App., infra., 21a). The evidence, however, shows that there was every reason to question McNeil, and that Houston was

the least logical person to transport patients. Houston was the only nurse assigned to the holding room. Patients had to be prepared, and their charts completed by her, before they could go to surgery. There were other nurses available as well as orderlies to push patients into surgery . The trial judge determined credibility, weighed the evidence and made the inference that it was logical to use Petitioner for pushing patients instead of the orderlies.

McNeil segregated Petitioner. She was the only nurse ordered to assume the orderlies' job of pushing stretchers. McNeil's order to Petitioner to take over the job of predominately white male orderlies was an act of overt discrimination in direct violation of Title VII. As stated by Chief Justice Burger in *Griggs v. Duke Power Co.*, 401 U.S. 424, 425: "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."

The courts below did not correctly apply Title VII, and sanctioned trial by affidavit under the guise of Rule 56(e) thereby effectively denying Petitioner her Seventh Amendment right to trial by jury.

III. The court of appeals erroneously held that a mere verbal reprimand constitutes prompt remedial action.

Petitioner's summary judgment evidence showed that Dr. Pearce had been engaging in a pattern of sexual and racially offensive conduct since 1984. Petitioners evidence showed that McNeil and nurse director Petersen had been aware of Dr. Pearce's conduct for years. Petitioner did not complain until July of 1991, because McNeil knew about Dr. Pearce's conduct, and Petitioner was afraid of confronting Dr. Pearce. After Petitioner complained to McNeil in July

of 1991, McNeil met with Dr. Pearce and "counseled" him to stop making racial comments to Petitioner. Dr. Pearce, after being "counseled", stopped making racial and sexual comments directly to Petitioner. His conduct in the workplace did not change however, but continued unabated. All Saints did not investigate Petitioner's complaint, nor did it discipline Dr. Pearce or develop appropriate sanctions. The hospital took no other steps to eliminate discrimination in the workplace.

The court of appeals has held that McNeil's meeting with Dr. Pearce is a defense because it was "prompt remedial action." The court's holding is erroneous because (1) the meeting with Dr. Pearce was not prompt or immediate since he had been engaging in sexual and racial harassment for years and, (2) it was not effective because his conduct continued. The court of Appeals concluded that the reprimand was prompt because it was shortly after Houston's complaint and that it was remedial in that it stopped Dr. Pearce from making offensive comments aimed directly at Houston. (App., Infra, 5a).

Under the EEOC Guidelines an employer should take all steps necessary to prevent sexual harassment from occurring and is responsible for acts of sexual harassment in the workplace unless it can show that it took immediate and appropriate corrective action. 29 C.F.R.§ 1604.11(b)

In *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981) the court held that an employer should promptly take all necessary steps to investigate and correct any harassment, including warnings and appropriate discipline directed at the offending party, and should generally develop other means of preventing harassment within the agency.

The courts below did not consider the totality of the circumstances pertaining to Dr. Pearce's sexual and racial conduct, but focused on the one incident which was reported to McNeil in July of 1991. The Supreme Court in *Meritor*

Savings Bank v. Vinson held: "The EEOC Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidence occurred.' 29 C.F.R. § 1604.11(b) (1985)." (477 U.S. at 69).

The court of appeals decision conflicts with the EEOC Guidelines, *Meritor Savings Bank v. Vinson*, and the D.C. circuits' decision in *Bundy v. Jackson.*

IV. There is a conflict among the circuits as to whether agents and supervisory employees are liable for violating Title VII.

Title VII defines "employer" to include "any agent of such a person." 42 U.S.C. § 2000e(b).

In *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir., 1986) the fifth circuit held that the definition of "employer" is broad and includes agents of the actual employer; and that employees' immediate supervisors are liable as "agents" under Title VII. In *Miller v. Maxwell's Intern. Inc.*, 991 F.2d 583 (9th Cir. 1993) the ninth circuit held that Title VII liability was limited to employers and did not extend to individual agents of employers who committed violations.

In *Rogers v. EEOC*, 454 Fed 234, 238 (5th Cir, 1971) cert. denied, 406 U.S. 957), cited by the Supreme Court in *Meritor*, Justice Goldberg said: "We must be acutely conscious of the fact that Title VII of the Civil Rights Act of 1964 should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination." If the definition of "employer" is given a liberal interpretation then supervisors and others exercising

authority in the workplace are "agents" under the Court's decision in *Meritor*.

The Supreme Court should resolve the conflict and decide that immediate supervisors and others who exercise authority in the workplace are "agents" and are liable when they violate Title VII. To hold otherwise will encourage supervisory personnel and others with authority such as Dr. Pearce to believe that they may violate Title VII with impunity.

V. The Question Presented is Important.

Notwithstanding the warning in *Anderson v. Liberty Lobby Inc.* the district courts are using Rule 56(e) F.R.C.P. as authority for a "trial on affidavits" and are deciding jury issues by summary judgment. The court of appeals in this case used *Anderson v. Liberty Lobby Inc.* as authority for the proposition that the non-movant must set forth specific facts supported by "summary judgment evidence" "establishing" the existence of a genuine issue as to any material fact, and cited *Celotex Corp. v. Catrett* for the proposition that the burden shifts to the nonmovant to show that summary judgment should not be granted (App., infra, 4a).

As predicted by Justice Brennan in his dissent in *Anderson v. Liberty Lobby Inc.*, trial judges have a "new procedure", and there is danger of a proliferation of summary judgment cases after "paper trials" on the merits.

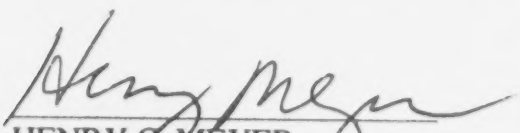
The courts below decided that Petitioner's quantum of "summary judgment proof" was not sufficient to permit a jury to weigh the evidence, determine the credibility of the witnesses, and decide what were logical and legitimate inferences from the facts. This case presents a rare opportunity for this Court to address the serious questions raised by the decisions of the courts below.

In addition, this case presents an opportunity for the Court to issue a definitive rule on "agency" and employer liability in Title VII cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



HENRY C. MEYER
Counsel of Record
4109 Penrose Avenue
Fort Worth, Texas 76116
(817) 732-4258
Counsel for Petitioner

APPENDIX

APPENDIX A

Opinion of court of appeals 1a

Order denying rehearing 15a

U.S. COURT OF APPEALS
FILED APR. 21, 1995
CHARLES R. FULBRUGE III, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-10968
Summary Calendar

PAMELA SUE HOUSTON,

Plaintiff-Appellant,

Versus

EBI COMPANIES, ET AL.,

Defendants,

DR. KENNETH PEARCE, JENNY McNEIL, individually, JENNY McNEIL, etc., All Saints Episcopal Hospital,

Defendants-Appellees

Appeal from the United States District Court
For the Northern District of Texas
(4:93-CV678-A)

Before DUHE, WIENER , STEWART, Circuit Judges.
PER CURIAM:*

Plaintiff-Appellant Pamela Sue Houston filed suit in state court against All Saints Episcopal Hospital (All Saints), Jenny McNeil (McNeil), and Dr. Kenneth Pearce (Dr.

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Pearce) (collectively, the Defendants-Appellees), alleging various common law torts as well as violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq.; 42 U.S.C. § 1981; the Texas Workers' Compensation Act; and the Texas Constitution. The Defendants-Appellees removed the case to the federal district court, which granted summary judgment in favor of the Defendants- Appellees and dismissed Houston's claim. Concluding in our plenary review that Houston has failed to show the existence of a genuine issue as to any material fact, we affirm the district court's dismissal.

I
FACTS AND PROCEEDINGS

Houston, an African-American registered nurse, was hired by All Saints in 1984. At that time, Dr. Pearce, a male Caucasian anesthesiologist, was performing anesthesia services at All Saints under a contract between the hospital and Anesthesia Care, Inc.[1] Houston worked with Dr. Pearce on occasion in her position as a nurse in the surgery department's Holding Room, where patients were taken prior to their surgeries.

McNeil was the supervisor of nurses in All Saints' surgery department. She completed Houston's evaluation forms based largely on information received from Ellen Baldwin, Houston's direct supervisor.

In July 1991, Houston complained to McNeil that Dr. Pearce had made a racially offensive comment to her. McNeil immediately reported Houston's complaint to the Director of Surgical Services at that time, Geraldine Petersen, who approved McNeil's proposed course of action- - to advise Dr. Pearce that racially offensive language would

[1]Dr. Pearce served as president of Anesthesia Care, Inc.

not be tolerated and that he must not make such remarks in the future. As soon as McNeil reprimanded Dr. Pearce, his conduct improved; he made no further racist comments to Houston.

In mid-August 1991, Houston injured her back while pushing a patient stretcher. She filed a worker's compensation claim and never returned to work at All Saints. On October 15, 1991, Houston filed a charge of employment discrimination against All Saints with the Equal Employment Opportunities Commission (EEOC) and the Fort Worth Human Relations Commission, the EEOC's local investigative agency, which responded by issuing Houston a "Notice of Right to Sue."

By letter dated June 18, 1992, All Saints advised Houston that her employment would be terminated under All Saints' leave of absence policy if she did not return to work by June 1, 1993, the anniversary of the June 1, 1992 date on which she had reached "maximum medical improvement" (MMI) according to the Texas Workers' Compensation Commission (TWCC). When June 1, 1993 came without Houston having reported to work, All Saints removed her from its active employment roster and sent her a letter informing her of its actions.

Houston's state court suit was filed against All Saints, McNeil, and Dr. Pearce on August 20, 1993, alleging various federal and state claims.[2] As noted earlier, the Defendants-Appellees removed the case to district court where they moved for summary judgment. The district court granted their motion and dismissed Houston's action. On appeal, Houston challenges the district court's summary judgment dismissal of her hostile work environment, discrimination, and retaliatory discharge claims.

---

[2] Houston also sued EBI Companies, which was later dismissed from the suit by agreement of the parties.

II
ANALYSIS

A. STANDARD OF REVIEW

In reviewing a grant of summary judgment, we apply the same standard as the district court.[3] Summary judgment must be granted if the record taken as a whole shows that there is no genuine issue as to any material fact that could lead a rational jury to find for the nonmoving party.[4] Our review of the facts in the record, however, draws all inferences most favorable to the party opposing the motion.[5] Once a movant makes a properly supported motion for summary judgment, the burden shifts to the nonmovant to show that summary judgment should not be granted because a genuine issue for trial exists.[6] The party opposing the summary judgment motion may not rest on mere allegations in the pleadings, but must set forth specific facts supported by summary judgment evidence establishing the existence of a genuine issue as to any material fact.[7]

B. HOSTILE WORK ENVIRONMENT

1. Prompt Remedial Action

To establish a claim against an employer grounded in the existence of a hostile work environment, a plaintiff must show, inter alia, that the employer knew or should have

---

[3] Waltman v. Int'l Paper Co., 875 F.2d 468, 474 (5th Cir. 1989).

[4] See Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

[5] Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986).

[6] See Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552-53 (1986).

[7] See Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2514 (1986); Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992), cert. denied, 113 S.Ct. 82 (1992).

known of the harassment in question and failed to take prompt remedial action "reasonably calculated" to end the harassment.[8] We have previously observed that the effectiveness of any initial remedial steps taken by the employer is an important factor in assessing what constitutes appropriate remedial action.[9] After reviewing the summary judgment evidence, we conclude that All Saints took prompt remedial action in dealing with Houston's complaint about Dr. Pearce.

After Houston informed McNeil of Dr. Pearce's offensive behavior, McNeil assured Houston that she would address the matter and immediately reported the complaint to Petersen, the Director of Surgical Services, who told McNeil that her planned reprimand of Dr. Pearce was the appropriate course of action. McNeil wasted no time in meeting with Dr. Pearce, telling him that racially offensive language would not be tolerated, and counseling him to cease making racist comments to Houston. After the meeting, Houston was promptly informed by McNeil of just how she had dealt with Houston's complaint. Houston admitted in her deposition that after McNeil's meeting with Dr. Pearce, his behavior "toned down a lot" and that Dr. Pearce made no further racially offensive comments to her.

Houston argues nonetheless that McNeil's reprimand could not possibly qualify as prompt remedial action because McNeil was only a nurse supervisor who had no authority over Dr. Pearce. We disagree, particularly in light of the effectiveness of McNeil's reprimand. McNeil's talk with Dr. Pearce, which occurred shortly after McNeil received

---

[8] See Garcia v. Elf Atochem North America, 28 F.3d 446, 451 (5th Cir. 1994); Jones v. Flagship Int'l, 793 F.2d 714, 720 (5th Cir. 1986), cert. denied, 107 S.Ct. 952 (1987).

[9] See Waltman v. Int'l Paper Co., 875 F.2d 468, 479 (5th Cir. 1989). See also Garcia, 28 F.3d at 451 (upholding grant of summary judgment for defendant, as he took prompt action against harasser and harassment actually ended).

Houston's complaint, succeeded in putting an immediate and permanent stop to Dr. Pearce's offensive comments aimed at Houston.[10] McNeil's technical authority in relation to Dr. Pearce is, therefore, irrelevant; the district court was correct in granting summary judgment on this ground.[11]

2. Dr. Pearce's Liability

Houston Also attempts to hold Dr. Pearce liable for his alleged discriminatory behavior towards Houston. As a Title VII suit may not be maintained against an individual, Dr. Pearce may only be held liable if he, in his employment capacity at All Saints, is deemed to be Houston's "employer" for Title VII purposes.[12] Title VII defines an "employer" as a person who has a certain number of employees and any agent of such person.[13]

We have previously held that the determination whether a defendant is a Title VII employer is a two-step process: first, the defendant must meet the statutory definition and second, an employment relationship must

---

[10] Although McNeil testified that Houston complained to McNeil only about Dr. Pearce's racist comments, we find in our analysis of Houston's hostile work environment claim that, as the alleged remarks contained both racial and sexual overtones, All Saints' prompt remedial action effectively put an end to both forms of harassment.

[11] As we agree with the district court's finding that All Saints took prompt remedial action in response to Houston's complaint, we need not, and therefore do not, address the preliminary issue whether All Saints is even subject to liability for Dr. Pearce's actions through any employer-employee or principal-agent relationship.

[12] See Grant v. Lone Star Co., 21 F.3d 649, 652 (5th Cir. 1994), cert. denied, 115 S.Ct. 574 (1994).

[13] Title VII states that "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar week in the current or preceding calendar year, and any agent of such a person." 42 U.S.C.
§ 200e(b)

exist between the defendant and the plaintiff.[14] The first step here is a given, as the parties agree that Dr. Pearce meets the Title VII statutory definition of employer by virtue of employing fifteen or more Certified Registered Nurse Anesthetists to assist him at the hospital. As to the second step, however, we conclude that the summary judgment evidence fails to show that an employment relationship existed between Houston and Dr. Pearce, thereby defeating Houston's efforts to have Dr. Pearce classified as her employer for Title VII purposes.

In determining whether an employment relationship exists, we apply the "hybrid economic realities/common law control test."[15] For the economic realities component of the test, we have focused on whether the putative employer paid the individual's salary, withheld taxes, provided benefits and set the terms and conditions of employment.[16] In examining the control component of the test, we have considered whether the putative employer has the right to hire and fire, to supervise the individual's work, and to set the individual's work schedule.[17] The right to control and direct a putative employee's work is the most important aspect of the control component.[18]

Houston claims that her testimony to the effect that Dr. Pearce "took charge" of the surgery department, that the nurses obeyed his orders, and that she believed that Dr. Pearce could have her fired, is sufficient to present a genuine issue as to a material fact. We disagree with Houston's

---

[14] See Deal v. State Farm Co. Mut. Ins. Co. of Texas, 5 F.3d 117, 118 n.2 (5th Cir. 1993) (citing Fields v. Hallsville Indep. Sch. Dist., 906 F.2d 1017, 1019 (5th Cir. 1990)).

[15] See id. at 118-19.

[16] See id. at 119; Mares v. Marsh, 77 F.2d 1066, 1068 (5th Cir. 1985).

[17] See Deal, 5 F.3d at 119; Fields v. Hallsville Indep. Sch. Dist., 906 F.2d at 1019-20 (5th Cir. 1990), cert. denied, 111 S.Ct. 676 (1991).

[18] See Fields, 906 F.2d 1017, 1019.

assertion. There is a total absence of any evidence in the record that Dr. Pearce had any input regarding Houston's employment conditions. The parties stipulated that Houston's direct supervisor was Ellen Baldwin, who reported to McNeil, and that Dr. Pearce did not set Houston's schedule, did not evaluate Houston's job performance, and did not have the authority to discharge any All Saints employee. The summary judgment evidence also reveals that Dr. Pearce did not provide Houston with any benefits or compensation.

Houston alternatively contends that, even if she had no employment relationship with Dr. Pearce, he functioned as an agent of her employer, All Saints, thereby subjecting him to Title VII liability. In refuting Houston's assertion that Dr. Pearce served as All Saints' agent, the Defendants-Appellees convincingly rely on our decision in Deal v. State Farm Co. Mut. Ins. Co. of Texas.[19] In Deal, we held that an "agent," for Title VII purposes, must be an agent with respect to employment practices.[20] The record in the instant case does not indicate that All Saints delegated any employment decisions to Dr. Pearce. The only evidence that Houston presents in her favor is her self-serving, subjective testimony that she believed that Dr. Pearce could have her fired and that Dr. Pearce must have had some relationship with All Saints, as he was performing services at the hospital. Houston's mere speculation is insufficient to create a genuine issue for trial. The summary judgment evidence does not reflect the existence of a genuine issue of material fact as to whether Dr. Pearce was Houston's "employer" for Title VII purposes -- either through a common-law employment relationship with Houston or as All Saints'

---

[19] 5 F.3d 117 (5th Cir. 1993).

[20] See id. at 119 (citing York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360, 362 (6th Cir. 1982)).

agent -- so the district court was correct in granting summary judgment in Dr. Pearce's favor.[21]

C. DISCRIMINATION

Houston alleged that All Saints and McNeil discriminated against her by requiring her to push patient stretchers, which allegedly caused her to fall behind in completing patient charts before the patients went in to surgery and adversely affected her job performance evaluations. She asserted that pushing stretchers was not part of her job duties and that McNeil had targeted her to do the task because Houston was an African-American nurse. We conclude that the summary judgment evidence does not reveal that discrimination had anything to do with McNeil's actions in requesting Houston to push patient stretchers.

Once a plaintiff shows a prima facie case of discrimination, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the allegedly discriminatory action.[22] If the defendant meets this burden of production, the plaintiff must then prove by a preponderance of the evidence that the defendant's proffered reason was not true and that it merely served as a pretext for unlawful discrimination.[23] The plaintiff retains at all times

---

[21] The Defendants-Appellees argue that Houston failed to exhaust her EEOC remedy by not mentioning Dr. Pearce in the EEOC charge and that she also failed to meet the Title VII jurisdictional prerequisites for her sex discrimination and harassment claims because her EEOC charge alleged only race, and not sex, discrimination. As we have found no genuine issue of material fact supporting the merits of Houston's claims, however, we need not, and do not, address these procedural issues.

[22] McDonnell Douglas Corp. v. Green, 93 S.Ct. 1817, 1824 (1973).

[23] See St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2747 (1993); Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993).

the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.[24] If the plaintiff does not present sufficient evidence for a jury to find that the protected status motivated the defendant's actions, or if the evidence that plaintiff offers is merely colorable or is not significantly probative, summary judgment for the defendant is appropriate.[25]

Houston did not produce any evidence showing that McNeil's motivation for ordering Houston to push the stretchers was discriminatory. On the contrary, the summary judgment evidence reveals that more efficient handling of patients was the reason McNeil asked Houston to help push stretchers. Defendant McNeil stated in her affidavit that orderlies at the hospital usually pushed patients on stretchers into the operating room, but first had to don head and shoe covers to preserve the sterile environment, thereby delaying the surgeries. As the surgical nurses were already prepared to enter the operating room, their assistance in pushing the stretchers sped up the process of moving patients, thereby expediting the surgical process.

Houston admitted in her deposition that the hospital wanted to move patients into the operating room faster, corroborating McNeil's statements. She also conceded that, from the outset of her employment with All Saints, she was always required to assist in pushing stretchers. McNeil testified that as a surgical nurse, Houston was a logical person from whom to seek assistance in pushing stretchers. Houston does not refute this testimony; neither does she present any evidence of discrimination, either direct or circumstantial. Thus, we uphold the district court's conclusion that Houston has failed to show that McNeil

---

[24] See Texas Dep't of Community Affairs v. Burdine, 101 S.Ct. 1089, 1093 (1981).

[25] See Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2511 (1986).

harbored a discriminatory motive in requesting that she push stretchers.

D. RETALIATORY DISCHARGE

Houston also contends that All Saints terminated her employment in retaliation for her filing an EEOC charge of discrimination and a workers' compensation claim with the TWCC. A plaintiff alleging retaliatory discharge bears the initial burden of showing a prima facie case of the employer's retaliatory conduct, after which the burden shifts to the employer to articulate some legitimate nondiscriminatory reason for discharging the employee.[26] As noted previously in our discussion of Houston's discrimination claim, once the employer meets this burden, the plaintiff has the burden of demonstrating that the employer's reason was merely a pretext for discrimination.[27]

Houston does not present any evidence of a causal nexus between her filings and her termination, an indispensable element of a prima facie case of retaliatory discharge.[28] She merely states that All Saints must have known that she filed a workers' compensation claim and an EEOC charge, and that, therefore, her filings must have been the reason she was terminated. This is obviously an unavailing leap of logic: An employer's knowledge of a plaintiff's participation in a protected activity, without more, is insufficient to show a causal connection between the

---

[26] See McDonnell, 93 S.Ct. at 1824; Burdine, 101 S. Ct. at 1094-95 (1981); Anderson v. Douglas & Lomason Co., 26 F.3d 1277, 1300 (5th Cir. 1994), cert. denied, 115 S.Ct. 1099 (1995).

[27] See McDonnell, 93 S.Ct. at 1825.

[28] See Anderson, 26 F.3d at 1300; Parham v. Carrier Corp., 9 F.3d 383, 389 (5th Cir. 1993); Swearingen v. Owens-Corning Fiberglas Corp., 968 F.2d 559, 562-63 (5th Cir. 1992); Jones v. Roadway Express, Inc., 931 F.2d 1086, 1090 (5th Cir. 1991).

plaintiff's participation in the activity and the adverse employment action.[29]

In addition, a review of the summary judgment evidence indicates that Houston's employment was terminated for no other reason than a neutral and consistent application of All Saints' absence control policy, which mandates an employee's discharge after a one-year leave of absence. Houston does not allege that All Saints applied the absence policy in a disparate manner. In fact, All Saints submitted evidence that all employees who were placed on leave in 1992 and did not return to work were terminated in 1993 under the absence control policy, regardless of the reasons for their absences. And, Houston's conclusionary allegations to the contrary notwithstanding, no evidence in the record shows that All Saints harbored any hostility towards Houston as a result of her having filed a workers' compensation claim and an EEOC charge. Contrary to Houston's contention, All Saints' facially neutral letter to Houston advising her that she had been placed on "non-active status" does not in itself imply any retaliation, as the evidence reveals that it was sent pursuant to the hospital's standard, automatic procedure for discharging employees who were absent for more than a year.

In a feckless effort to support her argument, Houston stresses that, contrary to All Saints' statement in its pre-termination letter to Houston, the TWCC did not rule that

---

[29] See Parham, 9 F.3d at 387 (rejecting plaintiff's assertion that employer's knowledge that employee had filed workers' compensation claim, standing on its own, was sufficient evidence of retaliatory motive); see e.g., Paragon Hotel Corp. v. Ramirez, 783 S.W.2d 654, 658-60 (Tex.App.-E. Paso 1989) (in reviewing sufficiency of evidence for retaliatory discharge verdict, court looked not only to employer's knowledge of compensation claim, but employer's expression of negative attitude toward worker's injury, failure to adhere to company policies, and disparate treatment of other employees who were similarly situated but not discharged).

she had reached MMI on June 1, 1992. All Saints used the MMI date as the starting point for Houston's one-year leave of absence and stated in its deposition that Houston was terminated because she failed to report for work by June 1, 1993. But even if All Saints' adoption of the June 1, 1992 MMI date for calculating Houston's leave of absence was in error, that mistake is irrelevant to a determination whether a prima facie case of discrimination exists.[30] Indeed, we have previously held that an employer's incorrect but sincere and reasonable belief that it had a valid reason to discharge an employee negates a finding that the termination was due to the employee's participation in a protected activity, i.e., filing a workers' compensation claim or an EEOC charge.[31] As Houston has failed to produce any summary judgment evidence of a causal connection between her filings and her discharge, no genuine issue as to any material fact exists for her retaliatory discharge claim.

Houston also asserts on appeal that the district court should have remanded her retaliatory discharge claim to the state court, as one of the grounds of that claim is based on Texas workers' compensation laws.[32] Under 28 U.S.C. §

---

[30] See Jeffries v. Harris Co. Community Action Ass'n, 615 F.2d 1025, 1036 (5th Cir. 1980) (employer's sincere belief in confidentiality of documents that employee copied and disseminated justified employee's termination, and correctness of employer's belief was irrelevant to discrimination question).

[31] See Dickerson v. Metropolitan Dade Co., 659 F.2d 574, 581 (5th Cir. Unit B Oct. 19, 1981) (observing that even if employer was wrong in its evaluation of employee's absenteeism, it did not violate Title VII if it acted on reasonable belief); Corley v. Jackson Police Dep't, 639 F.2d 1296, 1298 (5th Cir. Unit A Mar. 19, 1981) recognizing that mistaken but good-faith belief that employee violated employer's rules is sufficient to rebut McDonnell Douglas inference that employee's discharge was for impermissible reasons).

[32] See Jones v. Roadway Express, Inc., 931 F.2d 1086, 1091-92 (5th Cir. 1991) (holding that a claim based on Tex. Rev. Civ. Stat. Ann. art. 8307c, prohibiting retaliatory discharge, arises under workers' compensation laws of Texas).

1445(c), a defendant may not remove a civil action arising under a state's workers' compensation laws.[33] If the Defendants-Appellees' removal of Houston's retaliatory discharge claim was thus defective, the defect was procedural, requiring Houston to move for remand within thirty days.[34] As Houston never objected to the removal, she waived any procedural defect in the removal process and therefore forfeited any right to a remand.

III
CONCLUSION

As we find that Houston has failed to show the existence of any genuine issue of material fact for her claims alleging unlawful employment practices, the district court's grant of summary judgment is
AFFIRMED.

---

[33] Section 1445(c) states, "A civil action in any state court arising under the workmen's compensation laws of such State may not be removed to any district court of the united States."

[34] See Williams v. AC Spark Plugs Div. of General Motors Corp., 985 F.2d 783, 787-88 (5th Cir. 1993).

U.S. COURT OF APPEALS
FILED JUN. 12, 1995
CHARLES R. FULBRUGE III, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-10968

PAMELA SUE HOUSTON,

Plaintiff-Appellant,

Versus

EBI COMPANIES, ET AL.,

Defendants,

DR. KENNETH PEARCE, JENNY McNEIL,
individually, JENNY McNEIL, etc.,
ALL SAINTS HEALTH CARE, INC., d/b/a
All Saints Episcopal Hospital,

Defendants-Appellees

Appeal from the United States District Court
For the Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion 4/21/95, 5Cir., 1995, F.3d) (June 12, 1995)
Before DUHE, WIENER , STEWART, Circuit Judges.
PER CURIAM:
(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.
ENTERED FOR THE COURT:
"S/ J Wiener J "
United States Circuit Judge

APPENDIX B

District court's Memorandum Opinion and Order 16a

District court's final judgment 25a

District court's order of dismissal 26a

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
OCT. -7- 1994
NANCY DOHERTY, CLERK

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

PAMELA SUE HOUSTON,	§	
Plaintiff,	§	
VS.	§	NO. 4;93-CV-678-A
ALL SAINTS HEALTH	§	
CARE, INC., D/B/A	§	
ALL SAINTS EPISCOPAL	§	
HOSPITAL, ET AL,	§	
Defendants.	§	

MEMORANDUM OPINION
and
ORDER

Came on for consideration the motions of defendants All Saints Health System (named as "All Saints Health Care, Inc., d/b/a All Saints Episcopal Hospital " in plaintiff's complaint) ("all Saints"), Jenny McNeil (McNeil"), and Kenneth Pearce, M.D. ("Pearce") for summary judgment.[1] The court, having considered the motions, the responses of plaintiff, Pamela Sue Houston, the summary judgment

[1] As explained infra, the motions have already been partially granted.

evidence, the record,[2] and applicable authorities, finds that the motions should be granted.

I.

Plaintiff's Claims

On or about August 20, 1993, plaintiff filed her original petition in the 141st District Court of Tarrant County, Texas. On September 23, 1993, plaintiff filed her first amended original petition. By notice of removal filed o October 8, 1993, the action was removed to this court. Plaintiff was subsequently granted leave to amend her pleading once again, and, on April 19, 1994, filed her second amended complaint.

In her second amended complaint, plaintiff alleges that defendants discriminated against her based on her race and sex in violation of Title VII and 42 U.S.C. § 1981; that they were negligent per se in failing to ensure that applicable standards, ordinances, regulations and statutes were followed; that defendant All Saints hired incompetent workers and failed to properly supervise them and is thus vicariously responsible for harm caused by such persons to plaintiff; that defendants are liable for intentional infliction of emotional distress; and that defendant All Saints is liable for retaliatory discharge under the Texas Workers' Compensation Act. In connection with her Title VII claim, plaintiff specifically alleges that defendants (1) constructively discharged her by maintaining or allowing a hostile work environment, (ii) retaliated for her opposition to sexual harassment in the workplace, (iii) engaged in

---

[2] The record includes admissions of the parties contained in the "Established Facts" sections of the joint pretrail order signed September 28, 1994, and the supplemental joint pretrial order signed October 7, 1994. See Fed. R. Civ. P. 56(c).

disparate treatment because of plaintiff's race, and (iv) treated employees in such a way as to have a negative disparate impact on black professional employees.

In a telephone conference hearing on September 28, 1994, plaintiff, through her counsel, confirmed that she was abandoning a number of the claims asserted in her second amended complaint and that the only claims she still asserts are those set forth in the "Statement of Plaintiff's Claims" section of the joint pretrial order signed by the court on September 28, 1994.[3] Accordingly, the court, by order signed September 29, 1994, granted the motions for summary judgment to the extent that plaintiff had abandoned certain of her claims. The claims that plaintiff now asserts are that (1) she was discharged in retaliation for filing a workers' compensation claim and for filing an EEOC charge; (2) defendants All Saints and McNeil discriminated against plaintiff based on her race in connection with her merit raise, work breaks, twenty-four hour drug audit, pushing stretchers, completion of charts, and funeral leave; and (3) defendant Pearce subjected plaintiff to racial and sexual harassment constituting a hostile work environment.

II.

Applicable Summary Judgment Principles

A party is entitled to summary judgment on all or any part of a claim as to which there is no genuine issue of material fact and as to which the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The moving party has the initial burden of showing that there is no genuine issue of material fact. Anderson, 477 U.S. at 256. The movant may discharge this burden by showing an

[3] The joint pretrial order is also signed by counsel for all Parties.

absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has carried its burden under Rule 56(c), the non-moving party must do more than merely show that there is some metaphysical doubt as to the material facts. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The party opposing the motion may not rest on mere allegations or denials of pleading, but must set forth specific facts showing a genuine issue for trial. Anderson, 477 U.S. at 248, 256. An issue is material only if its resolution could affect the outcome of the action. Id. at 248. Unsupported allegations, conclusory in nature, are insufficient to defeat a proper motion for summary judgment. Simmons v. Lyons, 746 F.2d 265, 269 (5th Cir. 1984).

The Fifth Circuit explained the burden placed n the nonmovant:

> When the nonmovant fails to make a sufficient showing on an essential element of her case, the moving party is entitled to summary judgment "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."

McKee v. City of Rockwall, Texas, 877 F.2d 409, 414-15 (5th Cir. 1989) (quoting Celotex Corp., 477 U.S. at 323), cert. denied, 493 U.S. 1023 (1990).

III.

Standards applied to the Facts

A. Retaliation Claims:

Plaintiff first complains that she was terminated in retaliation for filing a workers' compensation claim. The burden is on plaintiff to establish a causal nexus between her compensation claim and discharge. Parham v. Carrier Corp., 9 F.3d 383, 386 (5th Cir. 1993). Moreover, to escape summary judgment, plaintiff must demonstrate the existence of evidence on each element essential to her case. Swearingen v. Owens-Corning Fiberglas Corp., 968 F.2d 559, 563 (5th Cir. 1992).

Here, defendants maintain that plaintiff was discharged as a result of the neutral application of an absence control policy. Swearingen, 968 F.2d 559. The summary judgment evidence reflects that plaintiff was terminated when she exhausted her one-year leave of absence without reapplying for employment. Plaintiff has not come forward with any summary judgment evidence to raise a genuine fact issue as to the reason for her termination.[4]

Plaintiff additionally alleges that she was discharged in retaliation for filing an EEOC charge of discrimination. Plaintiff has not, however, presented any evidence that she has exhausted her administrative remedies with regard to such a claim. Ray v. Freeman, 626 F.2d 439, 442-43 (5th Cir. 1980), cert. denied, 450 U.S. 997 (1981) ; Aleman v. Texas, 803 F. Supp. 10, 13 (S.D. Tex. 1992). Nor is there

---

[4] Although a retaliation claim is not removable and would ordinarily be remanded upon disposition of all other removable claims, Jones v. Roadway Express, Inc., 936 F.2d 789, 792 (5th Cir. 1991), justice would not be served by such a remand in this case. The summary judgment evidence clearly reflects that plaintiff was given notice of her placement on nonactive status and warned that if she did not return to work by June 1, 1993, she would be discharged. Plaintiff was in fact discharged upon expiration of the one-year nonactive status. There is no evidence of any causal connection between plaintiff's compensation claim and her termination, much less any evidence that plaintiff was treated any differently than any other similarly situated employee.

any summary judgment evidence to suggest that plaintiff was fired in retaliation for filing any charge of discrimination.

B. Discrimination Claims Against Defendants All Saints and McNeil:

Plaintiff maintains that defendant All Saints and McNeil[5] discriminated against her based on her race in connection with her merit raise, work breaks, twenty-four hour drug audit, pushing stretchers, completion of charts, and funeral leave. In this regard, however, she does not adduce any summary judgment evidence to support her conclusory allegations that she was discriminated against. For example, in her affidavit in opposition to the summary judgment motions, plaintiff admits that she was asked to push stretchers to get patients to the operating rooms faster. Specifically, "[plaintiff] overheard Dr. Pearce say numerous times that he wanted everything speeded up and that he couldn't make any money with patients in the holding room." Plaintiff'[s Reply to Defendant All Saints' Motion for Partial Summary Judgment, Exhibit "A", Affidavit of Pamela Sue Houston at 5. In her deposition, plaintiff stated that she did not know why she was asked to perform the task of pushing stretchers. McNeil testified that plaintiff was asked to push the stretchers because she was the holding room nurse and the logical person to do the job. There is no reason to question McNeil's explanation, i.e. no summary judgment evidence to raise a genuine fact issue regarding McNeil's explanation.

Plaintiff's deposition testimony with regard to each of the alleged acts of discrimination by All Saints and McNeil is similar. In each instance, plaintiff admits that she does not know whether she was treated differently from

---

[5] The Title VII claims are asserted against McNeil in her capacity as surgical supervisor only. See September 21, 1994, order regarding dismissal of Title VII claims against McNeil in her individual capacity.

other employees on the basis of her race.[6] The summary judgment evidence is insufficient to raise a fact issue as to any of the alleged bases for discrimination claims by plaintiff.

C. Discrimination Claims Based on Alleged Racial and Sexual Harassment by Defendant Pearce:

Plaintiff maintains that she was subjected to racial and sexual harassment by defendant Pearce that was so pervasive as to create hostile working environment. She further alleges that, because of Pearce's relationship with defendant All Saints, All Saints is liable for Pearce's conduct.

In determining whether All Saints is indeed liable for Pearce's conduct, assuming plaintiff's allegations are true, the court need not reach the point of examining the legal relationship between them.[7] That step is not necessary, because the summary judgment evidence shows that, whether or not Pearce was its employee, immediately after

---

[6] These admissions are also included in the "Established Facts" sections of the pretrial orders at 6, ¶ ¶ 28, 32. In at least one instance, plaintiff admits that she believes she was treated differently because of ¶comments she made that were critical of hospital practices and procedures with regard to the twenty-four hour drug audit. Id. at 12, ¶ 72.

[7] If such an examination was required, the court would find that there is insufficient summary judgment evidence adduced by plaintiff to create a fact issue as to an employer /employee relationship between All Saints and Pearce. The summary judgment evidence reflects instead that Pearce was an employee of Anesthesia Care, Inc., which in turn had a contract with All Saints. Applying the "hybrid economic realities/common law control test" of the Fifth Circuit, the summary judgment evidence leads only to the conclusion that Pearce was not an employee of All Saints. See Deal v. State Farm County Mutual Ins. Co., 5 F.3d 117, 119 (5th Cir. 1993); 10/7/94 Supplemental Joint pretrial order, ¶ 139.

plaintiff complained of Pearce's conduct, All Saints reprimanded Pearce. Plaintiff did not thereafter make any complaint regarding Pearce's conduct and, in fact, admitted that his conduct toward her changed. An employer does not have to use the most serious sanction available to punish an offender. Rather, as here, the employer need only take steps reasonably calculated to stop the harassment. Nash v. Systems, Inc., 9 F.3d 401, 404 (5th Cir. 1993); Landgraf v. USI Film Prods., 968 F.2d 427, 430 (5th Cir. 1992), aff'd, 114 S. Ct. 1483 (1994).

As for the claims against defendant Pearce, plaintiff has not come forward with sufficient summary judgment evidence to create a fact issue as to an employer/employee relationship between them. Rather, plaintiff has stipulated, in the September 28, 1994, joint pretrial order, that she was employed by defendant All Saints and that she did not have an employment contract with Dr. Pearce or Anesthesia Care, Inc.[8] 9/28/94 Joint pretrial order, § (F), ¶ ¶1& 3. Title VII applies only to employers, employment agencies, and labor organizations. Moreover, there is no summary judgment evidence that plaintiff filed any EEOC charge, much less a timely charge, against defendant Pearce. Way v. Mueller Brass Co., 840 F.2d 303, 307 (5th Cir. 1988). Nor is there any evidence that PEARCE waived, or is estopped from asserting, the requirement of a timely EEOC claim. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982). To the extent plaintiff purports to assert a discrimination claim under 42 U.S.C. § 1981, such claim cannot be maintained. Patterson v. McLean Credit Union, 491 U.S. 164, 176-86 (1989). The conduct complained of by plaintiff occurred prior to enactment of the Civil Rights Act of 1991, which

---

[8] Plaintiff has further stipulated to facts that are inconsistent with an alleged employer/employee relationship with Pearce in the 10/7/94 Supplemental Joint pretrial order, ¶ ¶ 85, 86, 89-93, 108-116, 118, 120, 122.

extended the protections of § 1981 to conduct occurring after establishment of the employment relationship. Said Act does not apply retroactively. Landgraf v. USI Film Prods., 128 L.Ed 229, 265 (1994).

IV.

For the reasons discussed herein,

The court ORDERS that defendants' motions for summary judgment be, and are hereby, granted and that plaintiff take nothing on her claims against defendants.

SIGNED October 7, 1994.

"S/ J McBryde "
JOHN McBRYDE
United States District Judge

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED OCT. 7 1994
NANCY DOHERTY, CLERK

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

PAMELA SUE HOUSTON,	§	
Plaintiff,	§	
VS.	§	NO. 4;93-CV-678-A
ALL SAINTS HEALTH	§	
CARE, INC., D/B/A	§	
ALL SAINTS EPISCOPAL	§	
HOSPITAL, ET AL,	§	
Defendants.	§	

FINAL JUDGMENT

In accordance with the court's memorandum opinion and order of even date herewith,

The court ORDERS, ADJUDGES and DECREES that plaintiff, Pamela Sue Houston, take nothing on her remaining claims against defendants, All Saints Health System (named as "All Saints Health Care, Inc., d/b/a All Saints Episcopal Hospital" in Plaintiff's complaints), Jenny McNeil, and Kenneth Pearce, M.D., and that such claims be, and are hereby, dismissed. The court further ORDERS, ADJUDGES and DECREES that defendants have and recover their court costs from plaintiff.

SIGNED October 7, 1994.

"S/ J McBryde "
JOHN McBRYDE
United States District Judge

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED SEPT. 21 1994
NANCY DOHERTY, CLERK

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

PAMELA SUE HOUSTON,	§	
Plaintiff,	§	
VS.	§	NO. 4;93-CV-678-A
ALL SAINTS HEALTH	§	
CARE, INC., D/B/A	§	
ALL SAINTS EPISCOPAL	§	
HOSPITAL, ET AL,	§	
Defendants.	§	

ORDER

Came on for consideration the motions of defendant Jenny McNeil (McNeil") to dismiss the Title VII claims asserted against her by plaintiff, Pamela Sue Houston, in plaintiff's second amended complaint. McNeil brings the motion in both her individual capacity and as surgical supervisor. The court, having considered the motion, plaintiff's response, the record, and applicable authorities, finds that the motion should be granted in part. Plaintiff's claims against McNeil, individually, will be dismissed, as Title VII does not provide for liability against employees in their individual capacities. Grant v. Lone Star Co., 21 F.3d 649 (5th Cir.), pet. for cert. filed, 63 U.S.L.W. 3161 (U.S. August 25, 1994) (No. 94-365); Miller v. Maxwell's Int'l. Inc., 991 F.2d 583, 587-88 (9th Cir. 1993), cert. denied. 114 S. Ct. 1049 (1994). Therefore,

The court ORDERS that McNeil's motion to dismiss be, and is hereby, granted in part and plaintiff's claims brought under Title VII against McNeil, individually, be, and are hereby, dismissed.

SIGNED September 21, 1994.

"S/ J McBryde "
JOHN McBRYDE
United States District Judge

APPENDIX C

Determination of the City of Fort Worth Human Relations Commission 28a

CITY OF FORT WORTH, TEXAS
Certified Return Receipt
#P 374 691 856

HUMAN RELATIONS COMMISSION
1000 THROCKMORTON STREET
FORT WORTH, TEXAS 76102

June 03, 1993

Ms. Pamela Sue Houston
3228 Bunkerhill Drive
Fort Worth, Texas 76140

Re: Pamela Sue Houston vs. All Saints Episcopal Hospital
HRC Charge No. 31A92019
EEOC Charge No. 31A920019
Date Filed: October 15, 1991
Date Served: October 17, 1991

DETERMINATION

Dear Ms. Houston:

Under the authority vested in me by Section 4, of the City of Fort Worth's Fair Employment Ordinance No. 7278, as amended, I issue on behalf of the Commission, the following findings as to the merits of the subject charge.

The timeliness, deferral and all other jurisdictional requirements having been met, the Respondent is an employer within the meaning of Employment Ordinance No. 7278 and Title VII.

The Charging Party alleges that the Respondent discriminated against her, in violation of the City of Fort Worth's Fair Employment Ordinance No. 7278, as amended, and of Title VII of the Civil Rights Act of 1964, as amended, because of her race, Black. Specifically, the Charging Party contends that her merit pay increase was only 3% due to her absences, even though she had scored 105% on her performance rating. The Charging Party contends she was treated differently in that she was required to push occupied bed stretchers and not relieved for breaks/lunch breaks. The Charging Party also contends she was subjected to a racially harassing atmosphere.

The Respondent's officials deny the allegations of discrimination and contend that the doctor who the charging Party accuses of racially derogatory statements was not an employee of theirs. The Respondent contends they have taken steps to raise individual physician awareness in the worksite concerning racial comments.

The findings indicate that a similarly situated Caucasian nurse received a 3% merit increase after being rated "E" in attendance and 55 points in performance. The Charging Party also received a 3% merit increase after being rated "E" in attendance, but with over 100 points in performance. The findings indicate the Charging Party returned from an on-the-job injury on May 31, 1991 with a doctor's recommendation to continue her duties and to obtain assistance with transporting stretchers if needed. The evidence indicates that the Charging Party was required to push occupied bed stretchers in spite of these doctor's requirements. Witness testimony indicates that no similarly situated non-Black comparables were pulled from their normal duties and required to push stretchers as the Charging party was. Witness testimony indicates that the Charging Party was not given assistance in pushing the occupied bed stretchers.

The evidence indicates that the Charging Party was treated differently than similarly situated non-Black employees in that she was not relieved for breaks/lunch breaks. The evidence also indicates that during July/August 1991, the Charging party complained to management of the racial comments/jokes made by a Caucasian doctor. Witness testimony supports the Charging Party's allegation regarding racially derogatory statements having been made by a Caucasian doctor with whom the Charging Party worked. No evidence was found to indicate that the Respondent took any action to correct these conditions prior to the Charging Party's complaint.

Examination of the evidence indicates that there is reasonable cause to believe the allegation to be true. No finding is made to any other issue raised, or which might be construed to have been raised by the subject charge.

Having determined that there is reasonable cause to believe that the law has been violated, I now invite the parties to join with the Commission in a collective effort toward a joint resolution of the matter and to eliminate unlawful employment practices. A representative of the Commission will contact each party in the near future to begin the conciliation process; until then, no action is required.

On Behalf of the Commission:

"S/ Michael D. Ivey "
Michael D. Ivey
Interim Executive Director
Fort Worth Human Relations Commission

MKI: lkw
cc: All Saints Episcopal Hospital
file

APPENDIX D

EEOC Notice of Right to Sue 31a

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:	FROM:
Pamela Sue Houston	EEOC District Office
3228 Bunkerhill Drive	207 S. Houston Street
Ft. Worth, Texas 76140	Dallas, Texas 75202
CHARGE NUMBER	EEOC REPRESENTATIVE
31A 92 0019	Myra Burns, Commission Rep.
TELEPHONE NUMBER	(214) 655-3398

TO THE PERSON AGGRIEVED:

This is your NOTICE OF RIGHT TO SUE, it is Issued at your request. If you intend to sue the respondent(s) named in your charge, YOU MUST DO SO WITHIN NINETY (90) DAYS OF YOUR RECEIPT O THIS NOTICE: OTHERWISE YOUR RIGHT TO SUE IS LOST.

☒☒ More than 180 days have expired since the filing of this charge.

☒☒ With the issuance of this Notice of Right to Sue, the Commission is terminating its process with respect to this charge.

An information copy of this notice of Right to Sue has been sent to the respondent(s) shown below.

cc: (to respondent) On Behalf of the Commission

"S/ Janet V. Elizondo, " 12/15/93

Janet V. Elizondo, Enforcement Manager

Mr. John Milburn	Rebecca A. Singer
All Saints Hospital	Fulbright and Jaworski
1400 8th Avenue	2200 Ross Avenue, Suite 2800
Ft. Worth, Texas 76101	Dallas, Texas 75201